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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1377

RUSSELL E. TRAIN, as Administrator of the United States Environmental Protection Agency,

Petitioner,

vs.

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF NEW JERSEY

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS	1
ARGUMENT—Administrative discretion over the allotment of funds is inconsistent with Congress' intent to assure the states that $18 billion in federal aid will be available and thus jeopardizes the achievement of the water pollution control goals set forth in the Federal Water Pollution Control Act Amendments of 1972	6
CONCLUSION	11

Cases Cited

New Jersey v. Train, D. N. J. Civ. No. 74-932 (Filed June 21, 1974)	2
State of Washington v. Train, D. D. C. Civ. No. 74-105 (Filed January 21, 1974)	2

Statutes Cited

Federal Water Pollution Control Act Amendments of 1971, S. Rep. 92-414, 92nd Cong., 1st Sess. 35 (1971)	7
33 U.S.C. (Federal Water Pollution Control Act Amendments of 1972):	
Sec. 1251	8
Sec. 1251(a)	2
Sec. 1251(a)(4)	3
Sec. 1282	4
Sec. 1283	7
Sec. 1285	7

PAGE

33 U.S.C. (Federal Water Pollution Control Act Amendments of 1972):

Sec. 1285(a) 3

Sec. 1285(b)(1) 6, 8, 9

Sec. 1287 ..... 3, 7, 8

Sec. 1311 2

Sec. 1319 2

Regulations Cited

37 Fed. Reg. (1972):

26282, Sec. 35.910-1(a) 3

39 Fed. Reg. (1974):

1847, Sec. 35.910-4(a) 3

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Interest of the *Amicus*

The State of New Jersey is filing an *amicus curiae* brief in this matter because of the vital importance the

Court's ruling will have on New Jersey's efforts to combat water pollution,[1] and because an examination of the Administrator's refusal to allot the full sums authorized by Congress for New Jersey will aid in understanding the harmful impact of said refusal upon achieving the national goals set forth in the Federal Water Pollution Control Act Amendments of 1972. This brief does not attempt to set forth a full length argument for affirmance of the court of appeal's ruling since those arguments have already been set forth in the brief of respondent, City of New York.

The first section of the Act, 33 U.S.C. § 1251(a), declares that its basic objective is to restore and maintain the chemical, physical and biological integrity of the nation's waters and to achieve a goal of zero water pollution by 1985. To achieve that fundamental purpose the Act sets forth a timetable for controlling and curing various sources and degrees of pollution. In particular, section 301 of the Act, 33 U.S.C. § 1311 provides that secondary sewage treatment standards shall be met by July 1, 1977, and that the best available technology shall be employed by July 1, 1983. Various civil and criminal penalties are provided by section 309, 33 U.S.C. § 1319, for those who fail to meet the pollution control standards.

[1] New Jersey's efforts to combat water pollution include two legal challenges to the Administrator's refusal to allot the full sums authorized by Congress. *New Jersey* v. *Train*, D.N.J. Civ. No. 74-932 (Filed June 21, 1974) and *State of Washington* v. *Train*, D.D.C. Civ. No. 74-105 (filed January 21, 1974). In the New Jersey case a preliminary injunction was issued on June 27, 1974, ordering the Administrator to make a full allotment to New Jersey for FY 1974 so as to guard against the possible lapse of said funds. New Jersey, along with 19 other states, intervened in the State of Washington case on June 28, 1974, in order to gain the protection of an order issued on that date guarding against the possible lapse of FY 1973 funds.

The first section of the Act also declares that it is national policy that federal financial assistance shall be provided to construct the publicly owned waste treatment works needed to meet the above described water pollution control goals. 33 U.S.C. § 1251(a)(4). Congress took a bold step in fulfilling that national policy by authorizing the appropriation of $18 billion for construction grants in section 207 of the Act. 33 U.S.C. § 1287. Pursuant to section 205(a), 33 U.S.C. § 1285(a), Congress imposed upon the Administrator of the Act the duty of alloting among the states their appropriate shares of the funds authorized.

However, the Administrator, acting at the direction of the President, has refused to allot the full amounts provided by section 205(a). Instead, the Administrator has allotted only one half of the $18 billion authorized for the fiscal years 1973 through 1975. In particular, on December 7, 1972 the Administrator allotted only 2 of the 4 billion authorized for FY 1973 and 3 of the 6 billion authorized for FY 1974. 37 Fed. Reg. 26282, § 35.910-1(a) (1972). Later, on January 9, 1974, the Administrator allotted 4 of the 7 billion authorized for FY 1975. 39 Fed. Reg. 1847, § 35.910-4(a) (1974). The net result to New Jersey of the Administrator's actions is that the State has only had available to it $639.9 million instead of some $1.3 billion which would be available if the full authorizations had been allotted.[2]

The actions of the Administrator in refusing to allot the full amounts have had and will continue to have a se-

[2] The actual allotments to New Jersey for the fiscal years 1973-1975 have been $154,080,000; $231,120,000; and $254,656,200, for a total of $639,856,200. *See*, 39 Fed. Reg., *supra*. Multiplying the total sums authorized by Congress in section 207 of the Act by the appropriate allotment percentages for New Jersey yields $1,300,823,000, as the full sum authorized for the State.

verely damaging impact on New Jersey's ability to meet the pollution control goals of the Act. According to the U. S. Environmental Protection Agency's 1973 Needs Survey, it will cost approximately $1.5 billion to meet the 1977 secondary waste treatment standards in New Jersey. *See,* Environmental Protection Agency, Costs of Construction of Publicly Owned Waste Water Treatment Works: 1973 Needs Survey, Table II, p. 12. Thus New Jersey would have to spend almost all of its potential full allotment of federal funds to meet the interim 1977 standards alone.[3] Since the Administrator has only allotted $639.9 million to New Jersey, the State will have to spend at least an additional $818 million of its own funds to meet the 1977 standards, an amount far in excess of the 25% share that Congress intended the states to expend on waste treatment facility construction. *See,* section 202(a) of the Act, 33 U.S.C. § 1282(a).

The 1973 Needs Survey also indicates that it will cost a total of almost $3.4 billion to meet the overall goals of the Act in New Jersey. Obviously, even full allotment of the funds authorized by Congress would not provide New Jersey with 75% federal funding for overall compliance with the Act. However, the full allotment of $1.3 billion would more than double the federal aid presently available to New Jersey to meet the staggering financial burdens of water pollution control.

Aside from the direct adverse monetary impact on water pollution control efforts, the incomplete allotments by the

[3] Assuming a cost of $1,458 million as indicated in the 1973 Needs Survey, then the federal share of 75% would come to almost $1,094 million of the total $1,301 million authorized by Congress for New Jersey. New Jersey would thus be left with only $207 million to meet the other even more costly requirements of the Act.

Administrator have been the cause of various secondary impediments. For example, planning has been rendered more difficult and less certain because state and local officials have not been able to anticipate the amounts that would be available, in spite of the Act's clear authorization of $18 billion, but rather have had to await the result of the Administrator's so far unbridled discretion in deciding how much to allot. Thus, New Jersey officials did not know for sure until January 9, 1974, how much money would be allotted out of the FY 1975 authorization. The possibility, timing and amount of future allotments remains totally speculative, precluding effective planning for its use. In addition, the delay in construction of needed waste treatment plants which is an inevitable result of the partial allotments will cause the overall cost of pollution control to rise because of inflation. It is an inescapable fact of present day economics that a treatment plant built at some date in the future will cost more than one built today.

Although the possibility of future allotments is factually and legally speculative, the above discussion demonstrates that New Jersey's need for the funds is definite; moreover, New Jersey's ability to plan for the rapid obligation and expenditure of the money is also definite. In spite of the relative newness of the present water pollution control grant program, New Jersey has already obligated 100% of its 1973 allotment and is well on its way toward obligating its 1974 and 1975 allotments. See Table I, Petitioner's Brief, p. 49.

Although the above table in petitioner's brief indicates that New Jersey had only obligated some $65 million of its 1974 allotment of $231 million by May 31, 1974, as of August 6, 1974 New Jersey has obligated a total of $124

million or 54% of its 1974 allotment. It is anticipated that New Jersey will obligate its entire 1974 allotment by the end of this year. Table I also indicates that New Jersey had obligated some $5.9 million of its FY 1975 allotment by May 31, 1974. However, as of August 6, 1974 that total has reached almost $20 million out of a total 1975 allotment of $254.6 million.[4] Based upon the best projections available at present, it is anticipated that New Jersey will completely obligate its FY 1975 allotment by the end of the present fiscal year, and that the State will be in a position to obligate the impounded portion of FY 1975 money within the additional year allowed by section 205(b)(1). 33 U.S. C. §1285(b)1.

ARGUMENT

Administrative discretion over the allotment of funds is inconsistent with Congress' intent to assure the states that $18 billion in federal aid will be available and thus jeopardizes the achievement of the water pollution control goals set forth in the Federal Water Pollution Control Act Amendments of 1972.

The Federal Water Pollution Control Act Amendments of 1972 specify an unusual scheme for funding the grant in aid program to states and municipalities for the construction of publicly owned sewage treatment facilities. That funding scheme, known as "contract authority", follows a three step process. First, pursuant to section 207, 33 U.S.C. § 1287, Congress authorized the appropriation of not to exceed $18 billion for construction grants. The funds are then made available to individual states under section 205 of the Act, 33 U.S.C. § 1285, after allotment according to ratios based on the various states' needs. The second stage of contract authority funding involves the approval of particular construction projects. Under section 203, 33 U.S.C. § 1283, once a project is approved, it becomes a contractual obligation of the United States for the payment of its proportional share. The final stage of contract authority is the payment of contractual obligations with funds that are subsequently appropriated for that purpose.

Because the approval of a project is deemed a contractual obligation of the United States, the recipients of a grant promise are assured of its ultimate payment. Contract authority is thus the method by which Congress has chosen to bind the federal government to the payment of funds that are authorized for the water pollution control program. This form of funding was selected by Congress over the normal authorization and appropriation route because of the strongly recognized need to assure those who would plan and construct sewage treatment facilities that the money promised would actually be made available. Earlier funding programs not involving contract authority had revealed serious flaws in that there was often a gap between what Congress promised through authorization bills and actually delivered through appropriation measures. *See,* Federal Water Pollution Control Act Amendments of 1971, S. Rep. 92-414, 92nd Cong., 1st Sess. 35 (1971). Therefore, in the 1972 Act Congress recognized the gravity of the nation's water pollution problem, and selected contract authority funding as the most appropriate means of tackling the momen-

[4] Section 205(b)(1), 33 U.S.C. §1285(b)(1), provides in part that any sums alloted shall be available for obligation on and after the date of allotment. Under said authority almost $20 million in FY 1975 money has been obligated to cover increased costs incurred on already approved projects and on initial planning grants, even though FY 1974 money has not yet been exhausted.

tous planning and building process that would be required to clean up the nation's waters by the dates specified. *See,* 33 U.S.C. § 1251.

Even though Congress evidenced a clear intent to provide for stable, long term funding under the Act, the legislative history, as fully discussed in both the petitioner's and respondents' briefs, also indicates an intent by Congress to allow the Administrator some discretion over the rate of spending under the Act. Unfortunately, the Administrator, acting at presidential direction, has selected a mode of exercising this discretion that is at fundamental odds with Congress' intent in providing for contract authority and which jeopardizes the achievement of the water pollution control goals set by the Act. The Administrator has chosen to exercise whatever discretion he possesses to control spending by refusing to allot the full amounts authorized by Congress. Thus, while section 207 of the Act, 33 U.S.C. § 1287, authorized the appropriation of $5 billion for fiscal 1973, $6 billion for fiscal 1974, and $7 billion for fiscal 1975, the Administrator only allotted $2, $3, and $4 billion for those years respectively.

Since only funds that have been allotted are available for obligation, 33 U.S.C. § 1285(b)(1), the Administrator's actions mean that only one half of the funds authorized by Congress to combat water pollution is presently available for contract authority funding. The other $9 billion is as unavailable for construction grants as if Congress had never authorized its appropriation.

The Administrator argues that the other $9 billion has not been lost, and that it can be made available through the process of supplemental allotments (Pet. Br. pp. 24-29). Whether or not this is true, and the fear of lapsed funds proves to be unfounded, is besides the point, since

the concept of partial initial allotments followed by possible supplemental allotments flies in the face of the commitment and assurances of stable funding that Congress intended to make by authorizing the expenditure of $18 billion through the contract authority method. Discretion at the allotment stage reintroduces into the funding process the exact same evils that Congress sought to avoid by using the contract authority method of funding. Until more funds are actually allotted, New Jersey officials have no accurate way of knowing how many more construction projects can be planned for use of federal aid, and as previously stated, New Jersey has used all of its FY 1973 allotment and is well on its way to exhausting both FY 1974 and 1975 funds. Thus, to the extent that funds have been withheld, contract authority funding is just as uncertain as the previous method—instead of waiting for uncertain congressional appropriations, state and local officials must now wait for the Administrator to exercise his dubious discretion in making new allotments.

The choice by the Administrator is all the more unfortunate because there is an alternative method of exercising discretion over federal spending under the Act. Instead of refusing to allot the full sums authorized, the Administrator could control the rate at which the allotted funds are obligated on projects. This latter means of control does not carry with it the uncertainty inherent in reduced allotments, because full allotment assures that the entire $18 billion in funds will be available under section 205(b)(1), 33 U.S.C. §1285(b)(1), until used. Although obligational control means that approval may be delayed, it does not cast doubt on the fact that the full amount will be available for eventual expenditure. There is a substantial difference in being given a vague expectation that unspecified sums may be allotted at unspecified

future dates, and knowing that $18 billion is definitely available, although its rate of expenditure will be controlled somewhat at the obligation stage. Under the Administrator's construction of the Act and the discretion that he believes Congress intended to give him, there is no way to accurately plan for the use of money beyond that which has actually been allotted. Furthermore, this method makes it difficult to plan staffing requirements and difficult to kindle local interest in planning for projects that have no assurance of funding. Under the respondents' construction of the Act and the Administrator's discretion thereunder, as found by the district and appellate courts in this matter, the actual money that New Jersey will get will be known, and even though the obligation date may be unknown (as with all projects initially submitted for approval), plans can be laid to construct as quickly as possible all of the sewage treatment facilities made possible by the Act. It cannot be gainsaid that Congress intended the discretion over spending to be exercised in *the* manner most harmonious with achieving the goals for which the money was authorized, and not in a manner which directly perpetuates the funding evils that Congress took great pains in curbing by enacting contract authority.

CONCLUSION

For the reasons set forth above and in the brief of the City of New York, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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